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In the Queen's Bench,  
Appeal No.

ARCHIBALD McNAUGHTON,

(Plaintiff in the Court below)

Appellant;

ALEXANDRE MADORE,

(Defendant in the Court below)

Respondent.

APPELLANT'S CASE.

J. RODHAM,  
Atty. for Appellant.

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PROVINCE OF CANADA,  
Lower Canada, to wit:

IN THE QUEEN'S BENCH,

APPEAL SIDE.

ARCHIBALD M'NAUGHTON,

Plaintiff in the Court below,

No. 3.

APPELLANT;

78.

ALEXANDRE MADORE,

Defendant in the Court below,

RESPONDENT.

APPELLANT'S CASE.

THIS is an Appeal from a decision of the Court below upon an action *en plainte* there instituted by Appellant against the Respondent; and, although the damage complained of is trifling, yet the case assumes considerable importance, as tending to determine the boundaries of several properties contiguous to a river called the Petite Riviere St. Pierre.

The Declaration is drawn up in the usual form.

At Enqueste the Plaintiff proved, by twelve witnesses, possession, as proprietor for a year and a day anterior to the *trouble*; and likewise possession by him and his late father, of the land in issue for upwards of thirty-five years past.

The trespass complained of is proved by two witnesses; and the damage of such trespass estimated at five pounds. That the Defendant did enter upon the said land and committed the acts alleged in the Declaration is not specifically denied.

To this suit the Defendant pleaded, that about 16 years ago he purchased a piece of land opposite to property owned by Plaintiff, and which extended from the King's highway, in the Parish of Montreal, to the South side of the Line of the Montreal & New York Railroad, and that since then he hath held said land as proprietor.

The Plaintiff alleges that according to his Title Deeds, which are filed in this cause, his father and himself have held possession, as proprietor, of the land therein described for more than fifty years, and that the said Riviere St. Pierre bounds this property upon the North side of the Line of the Montreal and New York Railroad.

The Defendant, on the contrary, alleges—and upon this point alone rested his defence—that true it was the Riviere St. Pierre divided the two properties, but that what the Plaintiff called the river was only a ditch, and that the natural bed of the river followed four or five acres farther South, and lay on the South, *not* on the North, side of the line of the Railroad.

In support of this pretension he produced thirteen witnesses, three of whom made no proof, but the remainder, with surprising uniformity of opinion, similarity of language, and resemblance in the order of their statement, made substantially two allegations:—

*First*.—That the water course running upon the North side of the Railroad is simply a ditch, made a few years ago, by a man named Carmichael, under the orders of the Board of Works, to carry off the leakages from the Lachine Canal.

*Second*.—That the Defendant's land is about five to seven arpents in depth. This defence, whatever it may be worth, the Appellant conceives he has completely rebutted.

1st.—By the greater number of and greater intelligence of his witnesses, who generally had better means of obtaining the information requisite in this cause, than could have those adduced by the Respondent. Most of them are wealthy and respectable farmers and land-owners, who have lived in the neighbourhood of the property in issue for many years. The Defendant's witnesses were nearly all farm labourers and uneducated men.

Eleven at least of the Appellant's witnesses swore that the natural bed of the river lies on the North side of the Railway. Among these witnesses were men who had been in the employ of the late Commissioners of the Lachine Canal and of the Board of Works, for periods of from five to thirty years. Among them are Mr. Bisset, the Superintendent of the Lachine Canal, and Mr. James Somerville, Provincial Arbitrator, who deposed that he knew the land in dispute for the past 40 years, and that *more* than 30 years ago, in conjunction with the late Michael Turgeon of Terrebonne, he made, by order of the then Court of King's Bench, in the District of Montreal, a *Procès Verbal* of the said river, and that from his knowledge of the Plaintiff's property for over 40 years, he knows it extends to the North side of the Line of the Railroad where it is bounded by a water-course, which forms part of the said River St. Pierre. His evidence is so strong and important, and is so strongly corroborated by the other witnesses of the Appellant's, that it has been deemed advisable to reproduce it herewith.

### DEPOSITION OF MR. SOMERVILLE.

"I know the parties in this cause, I know the piece of land described in the Plaintiff's Declaration and Exhibit No. 1, in this cause, as belonging to him the said Plaintiff. I have known the said land since the year one thousand eight hundred and three,—nearly fifty years ago. It then belonged to the Father of the present Plaintiff, and continued in his possession from thence up to his death, which occurred in the year one thousand eight hundred and forty-nine, when, I believe, it came into the possession of the Plaintiff by the will of his said late Father, and it still remains in the possession of the Plaintiff. I have with produce a pen and ink sketch or plan<sup>\*</sup> of the position or boundary of the said lot of land in this cause claimed, and which forms the Plaintiff's Exhibit, "A." The boundaries marked in the said sketch or plan with the letters "A, B, C, D," is the said river or creek known and sometimes called the Petite Riviere St. Pierre. The lot marked "F" is the said land belonging to the Plaintiff, and in dispute in this cause, and the adjoining lot marked "with the letter "E" is that belonging to William McNow, of Lachine. The said Petite Riviere or Lac St. Pierre, surrounded the two lots of land marked "E, F." The position of the said Riviere St. Pierre on the said Exhibit No. "A," as laid down by me, is identical with the water course laid down in the plan in this cause, filed by the Defendant, and therein marked with the letters "a, b, c, d." That water course is the said Riviere St. Pierre. I have known it for over forty years past, and during that period I have been over it repeatedly, assessing damages on the part of the Commissioners of the Lachine Canal, and also for the Proprietors of the Montreal and New York Railroad. More than thirty years ago I assisted in drawing up a Proces Verbal of the said Petite Riviere St. Pierre, in conjunction with the late Michael Turgeon, of Terrebonne, when we carefully and closely examined the position of the said Riviere St. Pierre. I was over the said land in dispute, about a month ago. The Plaintiff pointed out a lot of timber which he said had been cut by the said Defendant. The water course in the said Defendant's plan marked with the letters "E, F, G," is not the Riviere St. Pierre, nor a regular creek, but a slight overflow of water passes through there. The water course on the said plan from the letter "H" to "G" and from thence to the letter "P" was excavated about the year 1840, by the Board of Works to carry away the leakage and water from the Culvert marked in the said plan with the letter "P." The said land in dispute in this cause lies within the said Parish of Lachine. The said Petite Riviere St. Pierre, divides the said land from the limits of the said Parish of Montreal."

The Defendant filed a plan drawn up by Mr. Regnault a Surveyor. The water-course laid down in this plan and marked with the letter "A, B, C, D" is what the Defendant calls the ditch made by Carmichael, but, which Mr. Sommerville, and the other witnesses of the Plaintiffs, claim to be the Riviere St. Pierre. It is worthy of remark, that the Defendant carefully avoided to show his plan to any one of his witnesses, to point out thereby which was the natural bed of this river. None of them looked at, or referred to it. Most of the Plaintiff's witnesses made use of it, and pointed out which of the two water courses therein marked belonged to this river. Mr. Regnault, it is true, was examined by the Defence thereon, and he stated, that all he knew was from the information given him when he drew the plan about twelve months since. Mr. Macfarlane, a Provincial Surveyor, who about ten years since surveyed the line of the Montreal and New York Railroad from Montreal to Lachine, proved, that the course of the river followed the route marked by the said letters in Mr. Regnault's plan, "A, B, C, D."

2nd—It may also be observed, that the public maps drawn up by the late Commissioners of the Lachine Canal, certified to be correct by the then Surveyor General of Lower Canada, and which are deposited with the Prothonotary of the Superior Court, lay down the course of this river as alledged by the Appellant's Witnesses.

3rd—The second point asserted by the Defence is, that what the Appellant calls a part of this river, is in reality a *ditch*, made by one Carmichael, a few years ago, to drain the leakages of the Lachine Canal. They simply make this assertion. They give no grounds for the belief. This Carmichael is now dead. The Plaintiff has filed a certificate of his burial. He could not therefore be adduced. His Foreman is proved to have been William McNow, whose relationship to the Appellant precluded his testimony from being given. But four of the men who worked in this place called a ditch, under Carmichael, at the time stated by the Defence, were adduced by the Plaintiff in rebuttal, and they all swear positively, that it was no ditch,—that they made no ditch there, but simply removed from the water course the alluvial deposits which had been carried into it by the Canal! This unequivocal dis-proof of an important feature of the testimony of the defence, is, it is believed, alone sufficient, apart from the other circumstances, to throw discredit upon it. In fine, ten of the Defendant's witnesses swear that the water-course which the Appellant alleges, is the channel of the Riviere St. Pierre, is on the contrary a ditch made not more than fifteen years ago. On the other hand, Mr. Sommerville swears, and about thirteen other witness corroborate him, that more than thirty years ago he made a Proces Verbal of, and saw the Riviere St. Pierre flowing over the spot the Defendant's witnesses alledge to be a ditch made only fifteen years ago.

4th—The Defendant's title, and his witnesses, declare his land to lie in the Parish of Montreal. The Plaintiff's title and the land on which the trouble was committed is alleged by all his witnesses to lie in the Parish of Lachine.

5th—The Appellant conceives that if his evidence is insufficient it is at all events, sufficiently strong, and the points in issue are of a nature, to warrant, not the dismissal of his action, but the appointment of an *ex-parte* to determine, by competent evidence, which of the two water courses in dispute is the true bed of the river.

\* This plan will be found attached to his deposition, and lays down the course of the River St. Pierre, identical with the water-course marked with the letters "a, b, c, d," in the plan filed by the Defendant.

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At the same time, he would urge, that the weight of testimony adduced, is in his favor, and sufficient to obtain the conclusions of his declaration.

It may not be improper to observe, that Mr. Justice Day, though he did not formally dissent, did not concur in the judgment rendered in the Court below.

In conclusion the Appellant believes the record will disclose the following facts:

*First*.—That the proof of the Plaintiff's possession is clearly made out, as well as the trespass by the Respondent.

*Second*.—That the attempt of the Respondent to make the case turn upon titles, upon the boundary of the River, and not upon peaceable possession, cannot be maintained.

*Third*.—That, in reference to the important question, interesting not merely to the Appellant, but to all the proprietors along both sides of the Riviere St. Pierre, as to whether the pretended ditch was or was not the true bed of the River, it was the manifest duty of the Court to have ordered an *Ex-parte*, by competent parties, to determine it, and not to have given credence to witnesses to whom the Plan of the place was never shewn, and whose depositions are almost identical.

*Fourth*.—That the character and opportunities for judging of the locality of the bed of this river are manifestly in favor of the witnesses of the Appellant.

JOHN POPHAM,

*Appellant's Attorney.*

Montreal, 1st December, 1857.